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In The
Supreme Court of the United States

RONALD P. WHITE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

BRIEF OF AMICI CURIAE ALLIANCE OF PROFESSIONAL TATTOOISTS, INC. AND THE NATIONAL TATTOO ASSOCIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARC M. HARROLD
111 South Highland
Suite 336
Memphis, TN 38111
(901) 525-3082

GEORGE COCHRAN
Counsel of Record
University, MS 38677
(662) 915-7361

Counsel for Amici Curiae

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MISCELLANEOUS:

Alliance of Professional Tattooists (*http://www.safetattoos.com*) 1

National Institute of Environmental Health Sciences (*http://www.nieh.nih.gov/external/faq/tattoo.htm*) 2

National Tattoo Association (*http://www.nationaltattooassociation.com*) 2

INTEREST OF AMICI CURIAE[1]

Amici – collectively, the "Tattoo Associations," are two national, non-profit organizations involved with the international advancement of the art of tattooing generally and the development of increased social awareness of tattooing as an art form, increased quality and professionalism throughout the artistic and commercial tattooing community world-wide, and increased health and safety in the art of tattooing.

(1) THE ALLIANCE OF PROFESSIONAL TATTOOISTS, INC. ("APT") is a non-profit educational organization founded in 1992 to address health and safety issues involved in the art of tattooing. APT has been a leader in the development, advancement and training of safety measures for tattoo artists throughout the United States, Canada and Europe. For more information, *see*, www.safe-tattoos.com. As a testament to APT's prominence in tattooing-safety, The National Institute of Environmental Health Science, a component of the United States Department of Health and Human Services (DHHS), advises individuals interested in getting a tattoo to determine whether the tattoo-parlor is APT certified. "Another way to ensure safety is to check whether the tattooist at a particular parlor has been certified by the Alliance of Professional Tattooists (APT). This nonprofit professional organization has developed a set of infection control guidelines, in association with the

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[1] This brief is filed with the written consent of all parties. Written consent is filed with this Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae*, their members or their counsel, make a monetary contribution to the preparation or submission of this brief.

FDA, for its members to follow." National Institute of Environmental Health Science website, www.niehs.nih.gov/external/faq/tattoo.htm (visited July 28, 2002).

(2) THE NATIONAL TATTOO ASSOCIATION, INC. ("NTA") is a non-profit organization founded in 1976 whose focus is to heighten social awareness of tattooing as a contemporary art form and advance the quality, safety and professionalism involving the art of tattooing in the tattooing community worldwide. For more information, *see*, www.nationaltattooassociation.com.

As the instant case directly deals with whether tattooing is a protected art form under the First Amendment of the United States Constitution, and the sufficiency of safety regulations instead of an outright prohibition, both Tattoo Associations have a direct interest in the outcome of this case as it goes to the underlying art form that is the sole reason for the formation of each Alliance or Association, respectively, and is the underlying interest of the entire body of members of both Tattoo Associations.

The interest of the Tattoo Associations can be simply stated: to protect and preserve the art form that they practice and love. While tattooing is one of the oldest art forms known to mankind, whether it is protected under the First Amendment is an issue of first impression before this Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the *Writ* on this issue of first impression before it because:

(1) "[a] State court . . . has decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c)

(2) "[a] State court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c)

INTRODUCTION

The South Carolina Supreme Court stated, "tattooing . . . is unique in that it involves invasion of human tissue and, therefore, may be subject to state regulation to which other art forms (on non-human mediums) may not be lawfully subjected." Petitioner's Appendix at 6a.

The Tattoo Associations agree wholeheartedly with the South Carolina Supreme Court that: (1) tattooing "may be subject to state regulation," *Id.*; and (2) it is an "art form. . . ." *Id.* The Tattoo Associations disagree, however, with the proposition that the minimal health risks involved in tattooing either detract from First Amendment protections or warrant a total ban, as currently imposed by the State of South Carolina.

I. THE *PROCESS* OF TATTOOING IS PROTECTED ART UNDER THE FIRST AMENDMENT.

Although all Justices of the lower court agree that tattooing is a form of art, Petitioner's Appendix at 6a, 10a, the majority holds that the act (as compared to the final product) of tattooing "falls on the unprotected side" of the First Amendment. *Id.* at 7a. The process of tattooing, however, is "inseparably intertwined," *Bery v. City of New*

York, 97 F.3d 689, 695 (2d Cir. 1996) (internal citations omitted), with the message that exists in the finished product and, as such, warrants either mid-level review as speech/conduct under *United States v. O'Brien*, 391 U.S. 367 (1968) or review as a non-content based restriction on First Amendment rights. Specifically, as pointed out by the dissent below:

> The majority, by its emphasis of the word "process," appears to indicate that although the process of tattooing is not "speech," the end product thereof may be, such that the tattoo wearer may be entitled to First Amendment protection as the conveyor of a message. In my view, this is akin to saying that an author who is paid a commission to write a book by a publisher, or an artist commissioned to paint a rendering[,] does not engage in speech, but that the publisher, and purchaser of the painting, do engage in speech. I find such an analysis completely untenable.

Petitioner's Appendix at 12a, n.9.

The simple fact that a "health" interest may exist in the process portion of the art does not mean that it is any less communicative than art that involves a more traditional "canvas." It also does not alter the amount of constitutional protection that is due under the First Amendment. It simply means that the state's "health interest" will have to be balanced against an artistic process under the appropriate level of constitutional scrutiny to determine if the outright ban currently enforced by the state is permissible under the First Amendment. Whether tattooing is entitled to any First Amendment protection is an important question of federal law that must be settled by this Court.

II. THE *WRIT* SHOULD BE CONSIDERED AS IT RELATES TO MODERN TATTOOING.

"Over the last several decades the cultural status of tattooing has steadily evolved and is now accepted by a broader segment of society." *Lanphear v. Massachusetts,* Sup. Ct., Suffolk County, Case No. 99-1896-B (2000) (internal citations omitted).[2] Part of this acceptance is due to the remarkable advances in tattooing safety.

The Tattoo Associations provide information on the alleged "risks" of tattooing as well as the safety procedures that comprise modern tattooing in Appendix A (*attached*) so that this Court can consider the advanced, modern art of tattooing practiced in this country today.[3] Information is

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[2] Currently, South Carolina and Oklahoma are the only two states that outlaw tattooing instead of regulating it. In *Lanphear*, a Massachusetts state court held that the Massachusetts tattoo ban violated the First Amendment and article 16 of the Massachusetts Declaration of Rights. *Lanphear v. Massachusetts*, Sup. Ct., Suffolk County, Case No. 99-1896-B (2000) ("The act of creating a tattoo is intrinsically part of the expressive content of the art.") The Massachusetts law was later repealed.

[3] For purposes here, we will recognize "health and safety" as the State's asserted interest though it is clear that this is not the actual interest of the state. Senator Jake Knotts, who has been the main opponent of legalized, regulated tattooing in South Carolina as a member of both the State House and Senate, has repeatedly stated that it is religion, and not safety, that is the primary basis for the law. The religious opposition to tattooing is based in *Leviticus* 19:28 Bible, *King James version* ("You shall not make any cuttings in your flesh . . . nor any marks upon you. I am the Lord.") Knotts has stated openly, "[i]f the Lord wanted you to have a tattoo, he would have put it on you." Associated Press, *S.C. High Court Scrutinizes State's Tattoo Ban*, Nov. 15, 2002, *viewed on* www.freedomforum.org/templates/document.asp (visited Aug. 12, 2002). *See, also,* Chris Haire, *Ink Stink*, MetroBeat, May 7, 2002, *quoting Jake Knotts* ("It's in the Old Testament. You either

(Continued on following page)

also included that shows that the "underground" tattooing that results from this type of outright ban is far more dangerous than regulated tattooing. No court, at any time in this matter, has heard any actual evidence of health risks related to tattooing. Petitioner's Appendix at 2a. ("The trial court did not hear any expert medical testimony regarding the dangers of tattooing or the risks to public health caused by the process of tattooing."). In a state that does not require adult motorcycle riders to wear helmets,[4] South Carolina's safety argument appears especially hollow.

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believe in the Bible or not.") *Robert S. Greenberger,* Tattoo Taboo, Wall Street Journal, July 22, 2002, *quoting Jake Knotts.* ("If God wanted you to have a tattoo, he'd have put your name on you.") On the CBS "Early" Show, Knotts did not mention religion or safety, instead stating that tattooing was something that "we don't need" in South Carolina. 2002 Burrelle's Information Svcs., CBS News Transcripts, *The Early Show, CBS,* July 30, 2002. Knotts stated that the law was good because it gave people a chance to think about getting a tattoo as they drove to Georgia. *Id.* It is not clear why the same health concerns would not exist in Georgia or North Carolina, or why Knotts would encourage people to travel to get a tattoo if the risks actually exist. Knotts also stated that the law "preyed on our [state's] younger generation." *Id.* (Knotts did not mention that regulations would almost certainly include a restriction against tattooing minors.) Knotts asserted that "the people in South Carolina does [sic] not want their beaches with tattoo parlors popping up . . . ." *Id.* (Knotts ignores the availability of zoning provisions to address this problem.) Finally, Knotts stated that tattoos are "worse than drugs, really because you can go and get rehabilitated from drugs . . . ." *Id.*

[4] South Carolina Code of Laws § 56-5-3660.

CONCLUSION

It seems overly-dramatic to speak of persecuted artists and banned art forms in twenty-first century America. It has become instinctive under First Amendment jurisprudence that art receives more than low-scrutiny review. This issue, as it relates to other art forms, has been clearly settled by this Court in the past. *See, e.g., Kaplan v. California,* 413 U.S. 115, 119-20 (1973) ("As with pictures, films, paintings, drawings, and engraving, both oral utterance and the printed word have First Amendment protection. . . .") Tattooing deserves a chance to prove itself.

This law is not in place to protect people from any risks that may occur in modern tattooing. It remains in place for reasons of social and religious intolerance.[5] Regulations are clearly sufficient to address any risks that actually do exist. An outright ban is not necessary, justified or constitutional.

For the foregoing reasons, amici request that the writ be granted.

Respectfully submitted,

MARC M. HARROLD
111 South Highland
Suite 336
Memphis, TN 38111
(901) 525-3082

GEORGE COCHRAN
Counsel of Record
University, MS 38677
(662) 915-7361

[5] *See supra,* note 3 and accompanying text.

APPENDIX A

TATTOOING HEALTH RISKS AND SAFETY PROCEDURES

(a) The Health "Risks" Involved in Modern Tattooing:

It is simply not clear or proven that there are any significant risks when tattooing is performed in a professional manner utilizing modern safety measures. The National Institute of Environmental Health Science, a component of the United States Department of Health and Human Services (DHHS) expressly states on its website, responding to a question related to the risk of getting a tattoo: "If appropriate disinfection and sterilization techniques are used, the health risk associated with tattooing is small." *National Institute of Environmental Health Science* website, (www.niehs.nih.gov/external/faq/tattoo.htm) (visited July 28, 2002).

It seems obvious that some "risk" could be involved whenever the skin is broken and blood is involved in any way. This would be true of medical and dental care, the donation of blood, body-piercing, (including simple ear-piercing) and acupuncture, to name just a few such activities. Any "risks" of infection that are involved in "unsanitary" tattoo-parlors generally, are inherent (by definition) to "unsanitary" conditions, and not limited to, related to, or inherent to, the art of tattooing. Concern over the "sanitary" nature of tattooing would tend to lean towards, and not away from, regulated tattooing, in light of the evidence of "underground" and thus unregulated tattoo parlors. The Commonwealth of Massachusetts, in defending its similar tattooing-prohibition before the Massachusetts Supreme Court conceded that, "[a]lthough tattooing

is an invasive procedure and therefore has a higher risk of infection than non-invasive procedures, . . . the risks from unsanitary tattooing establishments are similar in nature to those associated with barber shops and restaurants." *Lanphear v. Massachusetts,* Sup. Ct., Suffolk County, Case No. 99-1896-B (2000).

The "risks" involved in tattooing, to the degree that they may actually exist, are related to the transmission of bloodborne pathogens and the potential of spreading diseases and infections such as AIDS and Hepatitis B & C.

(1) HIV/AIDS: "Tattooing is generally safe if performed by a reliable tattooist who follows proper hygiene and safety standards. There are no reported cases of tattooing causing HIV/AIDS." *Patrick J. Bird, Ph.D.,* University of Florida College of Health and Human Performance, Keeping Fit, University of Florida Website, www.hhp.ufl.edu/keepingfit/ARTICLE/TATTOO.html (visited July 31, 2002); *See also, Tattooing and Health Risk: What the Statistics Say,* Tattoo Artist website, www.tattooartist.com/health.html (visited July 31, 2002) (stating expressly "[n]o case of AIDS transmission ever documented in a U.S. tattoo studio."); *Center for Disease Control – CDC – HIV/AIDS Surveillance Report, 1997 entitled, "Estimated Incidence of AIDS and deaths of persons with AIDS – U.S. Jan. 1985 – June 1997"* (viewed at www.tattooartist.com/health.html) ("In its HIV/AIDS Surveillance Reports, CDC has consistently noted that it has documented 'no cases of HIV transmission through tattooing' anywhere in the country since it began tracking such data in 1985.") By comparison there have been at least 7 HIV transmissions associated with dentists and dental workers. *See* www.tattooartist.com/health.html (visited July 31, 2002). "HIV is a very delicate virus and

does not survive long outside the human body." *Tattoo Studio Guide,* www.tattoostudioguide.com/tattoo_faq.html (visited July 31, 2002).

(2) Hepatitis B & C:

Tattooing, when performed in a professional and careful manner, does not pose a significant risk of the spread of Hepatitis B & C or any other blood-borne illness. The Center for Disease Control ("CDC") located in Atlanta, Georgia classifies tattoo artists as "Personal Service Workers," ("PSW") a classification that also includes hairdressers, barbers, manicurists, acupuncturists, and massage therapists. "[N]o data exist [sic] in the United States indicating that persons with exposures to tattooing alone are at an increase[1] risk for HCV infection." *CDC Website*, www.cdc.gov/ncidod/diseases/hepatitis/c/tattoo.html (visited Aug. 14, 2002). "If the tattooist follows proper cleanliness and sterilization procedures – and the customer takes proper care of the tattoo in the days following the procedure while the skin is healing – the risk of contracting any kind of blood-borne illness is minimal." *Eskild Peterson, M.D., Chief, Infectious Diseases Section,* The University of Arizona College of Medicine, Tucson, www.ahsc.arizona.edu/opa/answers/liver.html (visited Aug. 14, 2002).

(b) Modern Tattooing Safety Measures:

"The last ten years have seen an educational renaissance within the tattoo industry." *Courtesy of the Alliance of Professional Tattooists*, Tattooing Advice www.tattoo studioguide.com/tattoo_faq.html (visited July 31, 2002).

(i) *Autoclave* – a machine that allows the tattoo artist to sterilize tattooing equipment. An autoclave uses a combination of heat, steam and pressure to kill all known pathogenic micro-organisms. There is a standard temperature and pressure that is used throughout the professional tattooing community: 270 degrees Fahrenheit at 35 psi.

(ii) *Single Service Equipment* – Each needle and tube set used in the tattooing process is individually packaged, dated and sealed. Each needle and tube used is sterilized in an autoclave before use. A small icon on the equipment packaging will change color when proper sterilization has occurred. A steam heat indicator ensures sterilization. No piece of equipment is used more than once. All needles, tubes, and tools are stored in a sealed paper or a plastic bag that is not opened until ready for use on an individual client. The client can observe the single use of each piece of equipment by being present when each sealed paper or bag is opened. The disposal of each piece of tattooing equipment is done in the customer's presence to ensure that the equipment is properly disposed of.

(iii) *Spore Test* – A spore test is a biological test that checks the efficiency of the autoclave. The spore test results are then displayed in the tattoo studio.

(iv) *Ultra-sonic Cleaner* – Tubes and any reusable equipment is cleaned in an ultrasonic cleaner. This cleaning method is far superior to hand-washing and scrubbing. Over-spray and splatter are eliminated through this method thus leading to sterile conditions.

(v) *Barriers* – Several "barriers" are used in modern tattooing. A moisture-resistant barrier covers the entire work area. This barrier is used for setting out ink caps, ointments, and the tattooing machine during operation.

This barrier prevents contamination of the work-area. Except for the machine tube, (which is sterilized in the autoclave) barriers are mandatory for all equipment which will be re-used in any manner. This includes the "clip cord" to avoid any cross-contamination between tattoos.

(vi) *Squeeze Bottle* – Tattoo artists use a squeeze bottle instead of a spray bottle for the soap used in the tattooing process. A spray bottle causes over-spray which can cross-contaminate the work area.

(vii) *"Disposables"* – Every item used in tattooing that can be disposed of is. This includes the ink caps which hold pigments used in tattooing, the stencil, wash cups used for cleaning machine tubes between colors, razors used to prep the tattooing area, non-latex gloves. Needles are specifically disposed of in a "sharps container" used in every industry which employs the use of needles.

(viii) *Single Material "Dipping"* – All ointments, petroleum jelly, and pigments are always dispersed before tattooing. The tattoo artist does not reach back into the jar or for the bottle. If new ointments or pigments are needed, new gloves, ointment sticks, ink caps are used instead of "reaching back" into previously used ointment sticks or ink caps.

(ix) *Disposable Gloves* – Tattoo artists use disposable gloves throughout the tattooing process.

(x) *Sharps Container* – A "sharps container" safely stores contaminated sharps before they are picked up for proper disposal. Proper bio-medical procedures are followed for disposal. These bio-medical procedures are identical to "sharps" and needles used in numerous other procedures (medical, dental, etc.).

(xi) *Universal Precautions* – OSHA Procedure: The Occupational Safety and Health Administration (OSHA) issues regulations for individuals who come into contact with blood and other contaminating substances in the workplace. The OSHA regulations, entitled, "Universal Precautions," are utilized throughout the United States in numerous occupations and workplaces where exposure is a concern. The American Red Cross (Red Cross) offers an on-line course entitled, "Universal Precautions for Tattoo Artists and Body Piercers" that teaches the use and application of the OSHA "Universal Precautions" specifically in the context of tattooing. This on-line course can be completed at the convenience of the tattoo artist from any on-line access. *See, e.g.,* American Red Cross website, www2.redcross-indy.org/hss/bbp-tattoo/intro1.asp (visited Aug. 1, 2002). There are a variety of ways that tattoo artists can learn and utilize the "Universal Precaution" standards that are extensively used by tattoo artists to ensure safety.

(xii) *APT Certification and Seminar Training* – Through the APT, tattoo artists have the opportunity to attend the "Prevention of Disease Transmission in Tattooing" (PDTT) seminar. This seminar allows tattoo artists to learn safe tattooing techniques, learn new techniques and safety measures, and refresh their existing knowledge. The seminars occur frequently and nationally in order for tattoo artists throughout the United States to attend. (For example, during 2002, training seminars are to take place in Orlando, FL; Philadelphia, PA; Minneapolis, MN; Detroit, MI; Atlanta, GA; Hollywood, CA; Pittsburgh, PA; Richmond, VA and numerous other locations). Certification is available to artists who attend these seminars and tattoo consumers are advised to look for this certification when visiting and choosing a tattoo parlor.

(xiii) *Increased Consumer Education / Screening* – While the majority of safety measures are employed by the tattoo artist, a marked increase in consumer education and consumer information has led to increased tattooing safety. Numerous information and "checklists" are available for tattoo consumers to inform them of what to look for in a professional and safe tattoo parlor. Numerous websites on the Internet supply information about what a tattoo-consumer should look for when "shopping" for a tattoo. The general / compiled checklist includes instructions to look for the following in a tattoo parlor before getting a tattoo there: (1) Autoclave; (2) Disposable gloves; (3) Vinyl or disposable apron; (4) Barrier on arm rest or customer chair, if necessary; (5) Barrier on work surface; (6) All items on the work station are readily accessible to avoid cross-contamination; (7) Ointments and petroleum jelly placed on surface before tattoo work is commenced; (8) Disposable razor; (9) Squeeze (not spray) bottle; (10) Barrier on squeeze bottle; (11) Disposable stencil; (12) No item re-used; (13) Only use of soap or water to apply stencil; (14) Disposable ink caps; (15) Ink must be poured out before the artist begins work; (16) Sterile packages with functioning steam-heat indicator for tubes and needles; (17) Barrier on machine head; (18) Barrier on power knob; (19) Barrier on clip cord; (20) Disposable wash cup; (21) Sharps container; (22) Needles disposed of in front of client; (23) Tattoo artist willing to answer any and all questions before beginning work; (24) A generally clean appearance to the shop that satisfies the client's "gut feeling."; and (25) Detailed instructions for client "aftercare."